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BEFORE THE  
SHORELINES HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE  
VARIANCE PERMIT DENIED BY THE  
CITY OF SEATTLE TO JAMES I.  
KIMBROUGH,

4101 BEACH DRIVE HOMEOWNERS'  
ASSOCIATION,

Appellants,

v.

CITY OF SEATTLE and STATE OF  
WASHINGTON, DEPARTMENT OF  
ECOLOGY,

Respondents.

SHB No. 84-49

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND  
ORDER

This matter, a request for review of the disapproval by the City of Seattle of a shoreline variance permit sought by James I. Kimbrough on behalf of the 4101 Beach Drive Homeowners' Association, came on for hearing before the Shorelines Hearings Board, Lawrence J. Faulk, Chairman, Gayle Rothrock, Wick Dufford, Rodney M. Kerslake, Nancy R. Burnett, and Beryl Robison, Members, convened at Seattle, on

1 January 28, 1985. Mr. Dufford presided.

2 Appellant 4101 Beach Drive Homeowners' Association appeared by its  
3 attorney, Edward Heavey. Respondent City of Seattle was represented  
4 by Judith B. Barbour, Assistant City Attorney. The Department of  
5 Ecology, joined as an additional party respondent by Order of the  
6 Board, appeared by Allen T. Miller, Jr. Assistant Attorney General.  
7 Nancy A. Miller officially reported the proceedings.

8 Witnesses were sworn and testified. Exhibits were admitted and  
9 reviewed. Arguments of counsel were received. From the testimony,  
10 exhibits and argument, the shorelines Hearings Board makes these

11 FINDINGS OF FACT

12 I

13 This matter arises in the City of Seattle in King County. The  
14 appellant 4101 Beach Drive Homeowners' Association (Homeowners) is  
15 composed of the owners of a four-story triplex dwelling located on an  
16 irregularly shaped waterfront parcel at the southwest corner of Beach  
17 Drive Southwest and Southwest Carroll Street in West Seattle.  
18 Respondent City of Seattle is a municipal corporation containing  
19 shorelines of the state subject to regulation under the Shoreline  
20 Management Act (SMA), and including the Homeowners' parcel.  
21 Respondent Department of Ecology (DOE) is a state agency with  
22 responsibilities for enforcement of the SMA including the approval or  
23 disapproval of locally issued variances.

24 II

25 The lot in question measures about 28 feet along its easterly

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1 boundary on Beach Drive Southwest and approximately 73 feet along its  
2 westerly boundary on the tidelands of Puget Sound. There is a  
3 concrete bulkhead shoreward of the westerly property boundary which  
4 defines the line of ordinary high water for the parcel. Southwest  
5 Carroll Street adjacent to the northern boundary of the property is an  
6 unimproved street and right of way, 150 feet wide, which provides  
7 access to and includes one of the few remaining natural beaches in the  
8 area.

9 To the south on the next lot is another, but older, triplex  
10 structure with no elevated decks or balconies. Further to the south  
11 are other multi-family structures, commonly with view decks or  
12 balconies which are closer to the water than the westerly wall of the  
13 triplex next door to 4101 Beach Drive Southwest. So far as the  
14 record shows, however, none of the view decks or balconies in the  
15 neighborhood were established by SMA variance.

### 16 III

17 From the concrete bulkhead to the western wall of the Homeowners'  
18 triplex is about 32.5 feet. From the bulkhead to the face of the  
19 western wall of the adjacent triplex to the south is a little over 31  
20 feet. Overhanging eaves on this building project waterward of its  
21 western wall more than 18 inches.

22 The nearest structure to the north of the Homeowners' triplex,  
23 beyond the 150-foot right of way, is set back 42 feet.

### 24 IV

25 On December 28, 1977, the acting Superintendent of Buildings for  
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1 Seattle entered a written interpretation of the shoreline setback  
2 applicable to the property at 4101 Beach Drive Southwest under the  
3 City's shoreline program. He advised predecessors in interest to the  
4 present appellants as follows:

5 A new residential structure at 4101 Beach Drive S.W.  
6 may be constructed no closer to the shoreline than  
7 the structure immediately to its south. A ground  
story deck may be permitted within the shoreline  
setback if no view blockage would occur.

8 This interpretation is contained in a public document identified as  
9 Superintendent's Interpretation No. 48.

10 V

11 Effective November 15, 1979, the Superintendent of Buildings  
12 issued Superintendent's Ruling 14-79 on the subject: "Determination  
13 of Residential Setbacks in the Shoreline District." For lots in  
14 factual settings like that at 4101 Beach Drive Southwest, this Ruling  
15 adopted essentially the same approach as taken in Superintendent's  
16 Interpretation No. 48.

17 However, in addition to a setback for principal buildings, Ruling  
18 14-79 established a separate setback for view decks and balconies.

19 Superintendent's Ruling 20-80, effective May 5, 1980, amended  
20 Ruling 14-79 to alter the definition of "Shoreline Adjacent  
21 Structures."

22 VI

23 On November 12, 1981, a shoreline development permit for 4101  
24 Beach Drive Southwest was sought by an architect acting on behalf of  
25 Salmon Bay Development Company, an organization with which James I.

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1 | Kimbrough was associated. Mr. Kimbrough testified that he purchased  
2 | the property after the architect had obtained the "building envelope"  
3 | from the City.

4 | The architect had a number of conversations with a land use  
5 | analyst assigned to the matter by the City. Different design  
6 | configurations were discussed. On March 1, 1982, a shoreline  
7 | substantial development permit was issued for a four-story triplex  
8 | building subject to a shoreline residential setback identical to the  
9 | structure located immediately to the south. View corridor  
10 | requirements were also imposed.

11 | The written decision granting the permit explicitly followed  
12 | Superintendent's Interpretation No. 48 and quoted that portion of it  
13 | which is set forth in Finding of Fact III above.

14 | The decision also referred to [Superintendent's] Rulings 14-79 and  
15 | 20-80. No mention was made in the decision or in the permit of any  
16 | balconies.

#### 17 | VII

18 | The permit was accepted, as issued, and no appeal of any of its  
19 | terms was made. Instead the triplex project was undertaken and  
20 | completed, adhering to the setback requirement described in the  
21 | decision granting the permit. The structure as built had no  
22 | balconies. Two ground level decks were constructed seaward of the  
23 | building's westerly wall.

24 | Mr. Kimbrough testified that balconies for each of the three  
25 | condominium units were contemplated at the outset. However, the

1 decision was made to maximize the building size within the "envelope"  
2 provided by the City. The balconies, as planned, would extend beyond  
3 that "envelope" and a conscious choice was made to forego this part of  
4 the project in the initial construction. Mr. Kimbrough stated that he  
5 did not seek a variance for balconies at the time of the initial  
6 permit process because he believed that the variance procedure would  
7 delay construction by six to eight months. He wanted to proceed  
8 sooner.

#### 9 VIII

10 Effective June 14, 1982, the Director of the City's Department of  
11 Construction and Land Use (successor under a reorganization to the  
12 Superintendent of Buildings) issued Director's Ruling 17-82. This  
13 document reaffirmed the City's 1979 setback ruling (now called  
14 Director's Ruling 14-79) and stated unequivocally that the setback  
15 requirements apply to the remodeling of existing residences as well as  
16 to the construction of new residences.

#### 17 IX

18 In late 1983 Mr. Kimbrough approached the City about constructing  
19 balconies on the triplex at 4101 Beach Drive Southwest. On  
20 December 6, 1983, a pre-application conference was held between  
21 Mr. Kimbrough and the same City land use analyst who had processed the  
22 initial substantial development permit application. The notes of the  
23 discussion, which bear the signatures of both Mr. Kimbrough and the  
24 City's analyst, state, in part:

25 Setback from water is established by existing triplex  
26 to south at the subject triplex's west wall line.

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1 Proposed decks will extend 4' closer to shoreline.  
2 No decks on building to south so need variance.  
3 Reference Section 24.60.395, Seattle Shoreline Master  
4 Program and Director's Rules 14-79, 20-80, 17-82.

5 X

6 In June 13, 1984, Mr. Kimbrough signed and submitted to the City  
7 an application for a shoreline variance to construct three 4-foot by  
8 13-foot balconies with open railings, at the northwest corner of the  
9 second, third and fourth floors of the existing triplex. The  
10 application was on behalf of the Homeowners.

11 XI

12 On July 26, 1984, a public hearing was held on the application and  
13 considerable opposing testimony was heard. In general, the objections  
14 concentrated on asserted view obstruction.

15 XII

16 On August 21, 1984, the variance application was denied. In the  
17 denial decision the Director of the Land Use Division stated:

18 The applicant indicates that the balconies are needed  
19 to market the units and that due to the restricted  
20 building area, it was not feasible to construct them  
21 within the setback line. However, the site  
22 restrictions have already been recognized in the  
23 application of the view corridor and setback line.  
24 The units are not substandard in size (over 1400 sq.  
25 ft. each) and balconies could have been included  
26 behind the setback line. There is no evidence that  
27 the strict application of the setback line precludes  
or significantly interferes with reasonable use of  
the property. Since no hardship has been  
established, variance relief in any degree would  
constitute a grant of special privilege. Variance  
approval in this circumstance would not be in the  
public interest and would be inconsistent with the  
intent and purpose of RCW 90.58.020.

XIII

On September 19, 1984, Mr. Kimbrough filed an appeal of the denial with this Board for the Homeowners. In his letter of appeal, he stated:

When the applicant purchased the property and constructed the building he was advised by a number of persons (lenders, architects, realtors, etc.) that balconies would be essential, that persons living on the waterfront in a high quality building would insist on them, not as an amenity, but as an essential basic part of the home. The applicant had a serious dilemma. The lot was too small to permit the balconies within the setback line and still construct an acceptable dwelling. So, the decision was made to proceed, staying within the constraints of the regulations, hoping that the advisors were wrong, keeping in mind, of course, that the privilege of seeking a variance would be available if needed.

XIV

The size of the units actually constructed is about 1,300 square feet, rather than 1,400 square feet as the City supposed in denying the variance. The difference is accounted for by stairs, hallways and other common areas. The proposed balconies would add 52 square feet per unit.

However, neither size nor the lack of balconies has, in fact, interfered with the marketability of the units. Two have been sold and a third, retained by Mr. Kimbrough possibly for his own use, is now rented. No price break was given on the units sold due to the absence of balconies. No promises were made to buyers that balconies would be added. Mr. Kimbrough said that he had no trouble selling the units.



XV

The City processed the variance application under the impression that the Homeowners' triplex was built exactly on the setback line established by the next-door structure to the south. Therefore, the City assumed the balconies would intrude four feet across this setback line. Because, as noted, the Homeowners' triplex is about a foot and a half further inland than the neighboring building, the actual intrusion of the proposed balconies would be 2.5 feet.

XVI

Mr. Kimbrough and his architect were under the impression from the time of the initial permit proceedings that variance criteria could be satisfied for the proposed balconies. But no City employee gave them assurances in that regard or made any promises respecting the outcome of a variance application.

XVII

The two existing ground level deck structures extending seaward from the westerly wall of the Homeowners' triplex are substantially larger than the proposed balconies. At present, one is used by ground floor dwellers and the other is reserved for occupants of the upper floors. These decks provide a dwelling-related outdoor area for triplex residents to experience the shoreline environment.

XVIII

The shoreline setback line established by the City of Seattle, in this case was derived from the location of the closest principal structure to the south and the direction of the concrete bulkhead at

1 the ordinary high water line. The method used in determining the line  
2 was consistent with the City's interpretation of its setback  
3 regulation.

4 XIX

5 Any Conclusion of Law which is deemed a Finding of Fact is hereby  
6 adopted as such.

7 From these Findings of Fact the Board comes to these

8 CONCLUSIONS OF LAW

9 I

10 The Board has jurisdiction over these parties and these issues.  
11 RCW 90.58.130.

12 II

13 Appellant, having requested review, bears the burden of proof in  
14 this proceeding. RCW 90.58.140(7).

15 III

16 Two issues are presented, as set forth in the Pre-Hearing Order:

17 1. As applied here, is the administrative method for determining  
18 shorelines setbacks consistent with the Seattle Shoreline Master  
19 Program and the Shoreline Management Act, chapter 90.58 RCW?

20 2. Does the development proposal satisfy the variance criteria  
21 set forth in WAC 173-14-150?

22 IV

23 The City has asked that we decline to entertain the first of these  
24 issues. It asserts that the setback was determined by the 1982 permit  
25 decision authorizing construction of the Homeowners' triplex, a

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1 decision which was not appealed. The City's argument calls for  
2 application of the doctrine of res judicata or the doctrine of  
3 collateral estoppel.

4 These are doctrines of repose used to foreclose the relitigation  
5 of matters which have already been tried in an adversary setting. The  
6 issue of where the setback for the Homeowners' building is properly  
7 located has never been determined in a contested proceeding.  
8 Therefore, neither res judicata nor collateral estoppel are  
9 appropriate here.

10 We render no opinion as to whether the acceptance of the setback  
11 in the original substantial development permit might preclude  
12 litigation of the setback in a subsequent variance proceeding on the  
13 basis of the concept of waiver. No case was made on this theory. It  
14 seems anomalous to allow an applicant for a variance to appeal on the  
15 grounds that he does not need a variance. However, questions of  
16 coverage of the SMA itself have been raised subsequent to permit  
17 denials. E.g., Putnam v. Correll, 13 Wn.App. 201, 534 P.2d 132 (1975).

18 V

19 We deny the City's request to dismiss the setback issue and  
20 address the matter on its merits. Essentially the issue is one of  
21 legislative interpretation.

22 The SMA's general policies, as set forth in RCW 90.58.020,  
23 emphasize both public access to the shorelines and the maintenance of  
24 aesthetic values. These include notions of visual access and  
25 retention of open space. Setbacks and other bulk and dimensional

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1 requirements are consistent with these policy objectives. Indeed,  
2 they are an essential part of the planned and rational effort to  
3 foster "reasonable and appropriate uses" which the SMA calls for.

4 The Seattle Shoreline Master Program (SSMP), as adopted by both  
5 the City and DOE, provides the following in Section 24.60.395F:

6 Residential structures on waterfront lots shall not  
7 be located closer to the shoreline than adjacent  
8 structures. If there is no other structure within  
9 one hundred feet, residential structures shall be  
located at least twenty-five feet back from the line  
of ordinary high water.

10 The plain purpose of this section is to conform new buildings to the  
11 historic setback where development has already occurred. This  
12 presents no conflict with the policies of the underlying statute. See  
13 Flood v. DOE, 38 Wn. App. 84, 684 P.2d 765 (1984).

#### 14 VI

15 Superintendent's Interpretation No. 48 (1977) and Director's  
16 Rulings 14-79, 20-80 and 17-82 interpret predecessor sections which  
17 did not differ from SSMP Section 24.60.395F in any pertinent way. As  
18 the interpretation of the administrators charged with implementing the  
19 master program, these opinions must be given great weight.

20 Weyerhaeuser Co. v. DOE, 86 Wn. 2d 310, 545 P.2d 5 (1976).

21 Under the City's construction of the language of Section  
22 24.60.395F the setback of a new principal structure on a lot is  
23 determined by the location of the next principal structure to each  
24 side within 100 feet. If such an adjacent structure is found on only  
25 one side when the shoreline is regular, then the setback is

26 at a distance from the shoreline no less than that of

1 the adjacent structure as measured from the closest  
2 point of the wall of the existing (adjacent)  
3 structure to the shoreline. View decks and/or view  
4 balconies shall be at a distance from the shoreline  
no less than the distance from the shoreline of view  
decks or balconies on the existing structures. Para.  
(c)3., Ruling 14-79.

5 Where the next principal structure has no view decks or balconies  
6 there is no separate setback line for such accessory structures. See  
7 Illustration 7 to ruling 14-79.

8 Accordingly, in the instant case, the sole setback line is a line  
9 paralleling the shoreline at a distance equal to the distance from the  
10 closest point to the shoreline of the wall of the triplex next door to  
11 the south.

12 We see no conflict between the City's interpretation and the  
13 language of SSMP Section 24.60.395F. The City's interpretation is an  
14 appropriate exercise in "filling the gaps" left by the general setback  
15 provision. See Hama Hama v. Shorelines Hearings Board, 85 Wn.2d 441,  
16 536 P.2d 157 (1975). The interpretation is, we conclude, reasonably  
17 consistent with the legislation it purports to implement and,  
18 therefore, is valid as applied here. Yakima v. Civil Service  
19 Commission, 29 Wn. App. 765, 631 P.2d 400 (1981).

## 20 VII

21 Director's Ruling 14-79 states the following in paragraph (c)7:

22 Porches and architectural features shall not be  
23 constructed in the shoreline setback. Eaves may  
project 18" into the shoreline setback.

24 The Homeowners' contend that this provision should be construed to  
25 allow taking the overhang of eaves into account in establishing the

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1 setback. We reject this argument.

2 Paragraph (c)3 of Ruling 14-79 (quoted above) explicitly fixes the  
3 setback measurement as from the wall of the adjacent building, not the  
4 eaves. That eaves may be allowed to project into the setback is  
5 irrelevant to the point from which the setback is measured.

6 We see no reason, and have been given none, to overturn the  
7 interpretation of the City on this detail.

8 VIII

9 Therefore, we conclude as to the first issue, that there is no  
10 legal infirmity in the method used for determining the setback.

11 IX

12 The second issue requires an examination of the terms of WAC  
13 173-14-150, incorporated by reference into SSMP Section 24.60.480.  
14 The pertinent provisions are as follows:

15 WAC 173-14-150 Review criteria for variance permits.  
16 The purpose of a variance permit is strictly limited  
17 to granting relief to specific bulk, dimensional or  
18 performance standards set forth in the applicable  
19 master program where there are extraordinary or  
20 unique circumstances relating to the property such  
21 that the strict implementation of the master program  
22 would impose unnecessary hardships on the applicant  
23 or thwart the policies set forth in RCW 90.58.020.

24 (1) Variance permits should be granted in a  
25 circumstance where denial of the permit would result  
26 in a thwarting of the policy enumerated in RCW  
27 90.58.020. In all instances extraordinary  
circumstances should be shown and the public interest  
shall suffer no substantial detrimental effect.

(2) Variance permits for development that will  
be located landward of the ordinary high water mark  
(OHWM), as defined in RCW 90.58.320(2)(b), except  
within those areas designated by the department as  
marshes, bogs, or swamps pursuant to chapter 173-22  
WAC, may be authorized provided the applicant can  
demonstrate all of the following:

1 (a) That the strict application of the bulk,  
2 dimensional or performance standards set forth in the  
3 applicable master program precludes or significantly  
4 interferes with a reasonable use of the property not  
5 otherwise prohibited by the master program.

6 (b) That the hardship described in WAC  
7 173-14-150(2)(a) above is specifically related to the  
8 property, and is the result of unique conditions such  
9 as irregular lot shape, size, or natural features and  
10 the application of the master program, and not, for  
11 example, from deed restrictions or the applicant's  
12 own actions.

13 (c) That the design of the project will be  
14 compatible with other permitted activities in the  
15 area and will not cause adverse effects to adjacent  
16 properties or the shoreline environment designation.

17 (d) That the variance authorized does not constitute  
18 a grant of special privilege not enjoyed by the other  
19 properties in the area, and will be the minimum  
20 necessary to afford relief.

21 (e) That the public interest will suffer no  
22 substantial detrimental effect.

23 ...

24 X

25 We conclude that the Homeowners' proposal to build balconies  
26 projecting into the prescribed setback fails to meet the criterion of  
27 WAC 173-14-150(2)(a).

28 The lack of balconies was not shown to preclude or significantly  
29 interfere with a reasonable use of the property otherwise allowed.  
30 The Homeowners' residential use of the property is permitted in the  
31 shoreline environment involved and is ongoing, with or without  
32 balconies. The absence of balconies was not shown to impose any  
33 economic hardship. The hardship asserted is apparently of a more  
34 ethereal nature. On our record, the lack of balconies comes down to  
35 merely the lack of a specific residential amenity. Even this is, to  
36 some degree, offset by the existence of the ground level decks. But,

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1 in any event, the deprivation here does not rise to the level of  
2 significant interference with a reasonable use. See Green v.  
3 Bremerton & DOE, SHB No. 81-37.

4 XI

5 We further conclude that the Homeowners' proposal fails to meet  
6 the criterion of WAC 173-14-150(2)(b).

7 The amount of buildable space on the lot is the result of the  
8 application of the setback and view corridor provisions of the master  
9 program to the specific property. The variance is now sought because  
10 the developer decided to fill the building "envelope" with the  
11 principal structure and take a chance on securing a variance for  
12 balconies later. No economic or other necessity for this decision  
13 was proven. It was a tactical decision based on business judgment.  
14 The resultant hardship, if any there be, was self-inflicted. See  
15 Salant v. Normandy Park, SHB No. 79-22.

16 XII

17 Having decided that the variance criteria cannot be met in this  
18 case, we nonetheless commend to the City these additional comments.  
19 No significant view interference or aesthetics problems are hereby  
20 prevented. No adverse cumulative effects are likely to follow.

21 Further, shoreline "creep" is not really precluded. Balconies  
22 could be built without a variance on the next-door building because  
23 there is a balcony on the building immediately to its south. If this  
24 were to occur, the Homeowners would be in a position to erect  
25 balconies without a variance because, then, a separate balcony setback



1 would exist for the triplex.

2 The key to the case is in the placement of the setback line. The  
3 City's refusal to describe a separate view deck or balcony setback  
4 when next-door buildings have no decks or balconies leads to the  
5 result reached here. Variance criteria are rigorous.

6 While the City's strict interpretation of its setback regulation  
7 is not invalid, and, while we are not empowered to rule on the wisdom  
8 of such matters, we invite reflection on the equity of the result in a  
9 neighborhood, such as this, where balconies are more the rule than  
10 they are a special privilege.

11 IV

12 Any Finding of Fact which is deemed a Conclusion of Law is hereby  
13 adopted as such.

14 From these Conclusions the Board enters this  
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ORDER

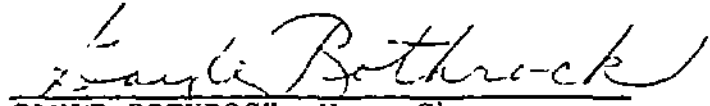
The decision of the City of Seattle to deny an application for a shoreline variance made by James I. Kimbrough for the 4101 Beach Drive Southwest Homeowners Association is affirmed.

DONE at Lacey, Washington, this 28th day of June, 1985.

SHORELINES HEARINGS BOARD


  
WICK DUFFORD, Lawyer Member

  
LAWRENCE J. FAULK, Chairman

  
GAYLE ROTHROCK, Vice Chairman

  
RODNEY M. KEASLAKE, Member

  
NANCY R. BURNETT, Member

  
BERYL ROBISON, Member